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No. 86-74

In The
# Supreme Court of the United States
October Term, 1986

GULF OIL CORPORATION,

*Petitioner,*

vs.

DANOS & CUROLE MARINE CONTRACTORS, INC.,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## RULE 28.1 STATEMENT

The parties to the proceedings in the Fifth Circuit Court of Appeals were Richard J. Doucet, Gulf Oil Corporation, and Danos & Curole Marine Contractors, Inc., Gray & Company, Inc. (underwriting managers for Danos & Curole Marine Contractors, Inc.) was not a party to the proceedings in the Fifth Circuit Court of Appeals. Danos & Curole Marine Contractors, Inc. has no parent companies, partially owned subsidiary companies or affiliates.

At the time of the inception of the litigation Danos & Curole Marine Contractors, Inc. was wholly owned by Danos Brothers, Inc. On December 31, 1983 Danos & Curole Marine Contractors, Inc. and other wholly owned subsidiary companies of Danos Brothers, Inc. were merged into the parent company and the name was changed to Danos & Curole Marine Contractors, Inc.

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## SUMMARY OF ARGUMENT

1. The Louisiana Oilfield Indemnity Act is not in conflict with any express Federal law or regulations. It is part of the body of contract law of the State of Louisiana which is adopted as surrogate Federal law applicable to the offshore platforms by virtue of the Outer Continental Shelf Lands Act. 43 U.S.C. 1331 et seq.

2. The Louisiana Oilfield Indemnity Act does not conflict with Federal law pertaining to indemnity contracts as announced in decisions of this Court and in decisions of Circuit Courts of Appeals. The case primarily relied on by petitioner, *United States v. Seckinger*, 397 U.S. 203 (1970) is distinguishable as a case applying Federal "common law" to a contract which was itself a creature of the federal law and thus properly so interpreted. Other cases relied on by petitioner decide questions of Maritime law which clearly is not the law Congress intended to apply on the platforms on the Outer Continental Shelf. *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969).

3. The Fifth Circuit's decision is not in conflict with decisions of the Third Circuit Court of Appeals or with other decisions of the Fifth Circuit. The decisions that the Fifth Circuit's decision is alleged to be in conflict with either deal with a contract that is a creature of the Federal law properly interpreted by a rule of federal common law or simply cite the seminal case of *United States v. Seckinger*, 397 U.S. 203 (1970), for a general proposition of law.

4. The Louisiana Oilfield Indemnity Act is not inconsistent with the Longshore and Harbor Workers' Com-

pensation Act. 33 U.S.C. 901 et seq. The provisions of the Longshore and Harbor Workers' Compensation Act dealing with indemnity agreements pertain to claims against vessels. They do not deal with and were not intended to deal with contractual claims for indemnity between private parties performing operations on the Outer Continental Shelf.

5. The argument that petitioner paid for respondent's insurance was not raised in the Fifth Circuit nor decided in that court and should not be considered by this Court. The question of insurance is specifically dealt with in the Louisiana Oilfield Indemnity Act. Circumvention of the anti-indemnity provisions of the Louisiana Oilfield Indemnity Act by requirement of purchase of insurance is specifically prohibited. The policies themselves, insofar as they pertain to an indemnity contract, are thus voided.

6. The Louisiana Oilfield Indemnity Act does not impair any obligation of the contractual relationship involved in this case. The Louisiana Oilfield Indemnity Act affects only economic and commercial interests. It does not affect any fundamental interests and does not contain any suspect classification. The Louisiana Oilfield Indemnity Act is a rational attempt by a state legislature to advance a legitimate state interest. The Louisiana Oilfield Indemnity Act is not violative of the Contract Clause, Due Process Clause or the Equal Protection Clause of the United States Constitution.

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## ARGUMENT

Petitioner seeks certiorari on the grounds that (1) the application of the Louisiana Oilfield Indemnity Act conflicts with express Federal law regarding conduct of activities on the Outer Continental Shelf; (2) the Louisiana Oilfield Indemnity Act conflicts with existing Federal law pertaining to indemnity agreements; (3) the Fifth Circuit's decision below conflicts with the Third Circuit's decision in *Beloit Power System, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427 (3rd Cir. 1985); (4) the application of the Louisiana Oilfield Indemnity Act would deprive petitioner of the benefit of insurance for which it claims to have paid; and (5) the Louisiana Oilfield Indemnity Act is violative of the Contract Clause, Equal Protection Clause and the Due Process Clause of the United States Constitution. None of petitioner's arguments has merit.

### THE LOUISIANA OILFIELD INDEMNITY ACT DOES NOT CONFLICT WITH THE OUTER CONTINENTAL SHELF LANDS ACT, REGULATIONS PROMULGATED THEREUNDER OR ANY EXPRESS FEDERAL LAWS.

Petitioner first argues that the Louisiana Oilfield Indemnity Act preempts[1] expressed Federal law regulating the development and production of resources on the Outer Continental Shelf.

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[1]Petitioner's use of the word preempt in its brief apparently means no more or no less than it contends that the Louisiana Oilfield Indemnity Act is inconsistent with the Federal law.

The Louisiana Oilfield Indemnity Act does not preempt any Federal law. The Louisiana Oilfield Indemnity Act is, in fact, surrogate Federal law applicable to the offshore platforms situated on the Outer Continental Shelf off of the coast of Louisiana. Congress, in adopting the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq., clearly intended that the laws of the adjacent states be adopted as surrogate Federal law applicable to the offshore platforms. 43 U.S.C. 1333 (a) (2) (A); *Rodrigue v. Aetna Casualty and Surety Company,* 395 U.S. 352 (1969). That approach was chosen in order to deal with the full range of legal relationships which Congress recognized would exist amongst the parties doing business or conducting activities on the Outer Continental Shelf. Congress realized that the Outer Continental Shelf Lands Act and the full body of Federal law would not be broad enough to cover all situations because the Federal law is simply not a comprehensive body of law which deals with all aspects of all types of legal relationships existing in these United States.

Petitioner does not point to any specific Federal statute or any specific Federal regulation with which the Louisiana Oilfield Indemnity Act is alleged to be inconsistent. That is so because there is no such Federal statute or Federal regulation. Nor is there any Federal jurisprudential rule with which the Louisiana Oilfield Indemnity Act is inconsistent. This is seen in the discussion of the next topic, "The Louisiana Oilfield Indemnity Act Does Not Conflict with Existing Federal Law."

Petitioner asserts that the Louisiana Oilfield Indemnity Act is not applicable on the Outer Continental Shelf

because it "attempts" to participate in the administration, production, and development of an area outside of state boundaries and jurisdiction. That is not so. The Louisiana Oilfield Indemnity Act is one small part of the law of the State of Louisiana which pertains to contractual relationships between private individuals. It is part of the adjacent state contractual law which Congress intended to adopt as Federal law applicable on the Outer Continental Shelf just as Congress intended to have other "bodies" of state law (such as the tort law) so apply. *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969), *Chevron Oil Company v. Huson*, 404 U.S. 103 (1971).

**THE LOUISIANA OILFIELD INDEMNITY ACT DOES NOT CONFLICT WITH EXISTING FEDERAL LAW.**

Petitioner next argues that the Louisiana Oilfield Indemnity Act conflicts with existing federal law pertaining to indemnity contracts. That is not the case.

Petitioner cites this Court's decision in *United States v. Seckinger*, 397 U.S. 203 (1970), for the proposition that there is a body of Federal law concerning indemnity agreements and that application of the Louisiana Oilfield Indemnity Act would be in conflict with that body of Federal law as announced by this Court in *Seckinger*. Petitioner's reliance is misplaced.

*United States v. Seckinger*, 397 U.S. 203 (1970), dealt with a contract between the United States Government and a private contractor. The contractor, the Seckinger Company, had contracted with the United States Government

to provide certain plumbing work at a military base. The government drafted and entered into the contract pursuant to authority conferred by federal statute and in accord with the rules and regulations promulgated by the Administrator of General Services under authority of statute.

In discussing the law applicable to the contract at issue, this Court said,

> Preliminarily, we agree with the Court of Appeals that federal law controls the interpretation of the contract. (Citations omitted) *This conclusion results from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution. United States v. Seckinger*, 397 U.S. at 209, 210. (emphasis added)

This Court was correct in fashioning a federal rule to apply to the contract involved in *Seckinger*. The contract itself was a creature of Federal law. The terms of the contract were set out in Federal regulations!

The holding in *Seckinger* certainly does not establish a rule that must be followed in interpreting contracts between private parties.

The holding in *Seckinger* does not establish a Federal law of indemnity inconsistent with application of a state rule of law as surrogate Federal law to contracts between private parties for work to be performed on the Outer Continental Shelf. There is no Federal *general* common law, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and there is no Federal common law pertaining to indemnity contracts between private parties.

Petitioner points out that there is a body of Maritime law interpreting indemnity clauses in maritime contracts.

Petitioner states that an indemnity clause in a maritime contract is interpreted according to Federal law rather than state law. By "Federal law" in that context petitioner surely means the Maritime law. However, this Court in *Rodrigue v. Aetna Casualty and Surety Company,* 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), held that the Maritime law is not applicable on offshore structures. The Court in those cases held that the law applicable is Federal law as set out in the Outer Continental Shelf Lands Act itself which adopts state law as surrogate Federal law where not inconsistent with other Federal laws and regulations. 43 U.S.C. 1333 (a) (2) (A).

**THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER DECISIONS OF CIRCUIT COURTS OR ITS OWN DECISIONS.**

Petitioner asserts that the Fifth Circuit's decision is in conflict with the Third Circuit's decision in *Beloit Power Systems, Inc. v. Hess Virgin Islands Corp.,* 757 F.2d 1427 (3rd Cir. 1985). At issue in *Beloit* was the interpretation of an indemnification clause in a contract between Beloit Power Systems. Inc. and Hess Oil Virgin Islands Corp. The court very clearly applied the law of the Virgin Islands to the issue of contractual indemnity before it. *Beloit Power Systems, Inc. v. Hess Virgin Islands Corp.,* 757 F.2d at 1430. It cited *Seckinger* for the proposition that *generally* the law permits a contractual indemnitee to recover for his own negligence when the contract clearly so provides. Absent the specific prohibition of the Louisiana Oilfield Indemnity Act Louisiana law would so provide as well. The fact that the law of

the Virgin Islands generally permits indemnity while the law of the State of Louisiana specifically prohibits it in certain circumstances has no bearing on this case. The Fifth Circuit's decision is not in conflict with the Third Circuit's decision in *Beloit* or in the Third Circuit's decision in *Eastern Airlines v. Insurance Co. of North America*, 758 F.2d 132 (3rd Cir. 1985) which simply followed the court's earlier decision in *Beloit*.

In *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974) the Fifth Circuit correctly followed the law as set out in *Seckinger* because it was also dealing with a contract to which the United States Government was a party. In *Smith* the court quoted *Seckinger* saying:

> We observe initially that here, as there, the interpretation of the contract is controlled by federal law, which was entered into "pursuant to authority conferred by federal statute and, ultimately by the Constitution." 497 F.2d at 507. (citation omitted)

That holding is not inconsistent with the holding in the instant case.

**THE LOUISIANA OILFIELD INDEMNITY ACT IS NOT INCONSISTENT WITH THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AS INCORPORATED IN THE OUTER CONTINENTAL SHELF LANDS ACT.**

Petitioner argues that the Louisiana Oilfield Indemnity Act is inconsistent with Section 905 (B) and (C) of the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. 901 et seq. That argument is misplaced.

Section 905 (B) and Section 905 (C) of the Longshore and Harbor Workers' Compensation Act deal with claims

against vessels. There is nothing in those sections of the Act or in the legislative history which indicates any intention of the Congress to deal with anything other than the liability of vessels.

The Longshore and Harbor Workers' Compensation Act does not deal with contractual indemnity agreements between employers and nonvessels on the Outer Continental Shelf. Petitioner is correct that nothing in the Longshore and Harbor Workers' Compensation Act prevents the application of contractual indemnity agreements between employers and nonvessels. There is also nothing in the Longshore and Harbor Workers' Compensation Act that provides that a state cannot proscribe indemnity agreements between employers and nonvessels. The Longshore and Harbor Workers' Compensation Act simply does not deal with those matters. It is a matter left to be dealt with by application of the state law as surrogate Federal law as clearly and specifically provided by the Outer Continental Shelf Lands Act. 43 U.S.C. 1333 (a)(2)(A)

**GULF'S CONTENTIONS RELATIVE TO PAYMENT FOR INSURANCE.**

Petitioner asserts that it paid for Danos & Curole Marine Contractors, Inc.'s insurance. Petitioner further asserts that Danos & Curole Marine Contractors, Inc.'s insurer has already been paid to provide protection to Gulf but is not required to do so by the decision below. Danos & Curole Marine Contractors, Inc.'s insurer is not a party to the litigation. No contention was made in the Court of Appeals below that the contract at issue should be enforced in the face of the specific clear prohibition

of the Louisiana Oilfield Indemnity Act simply because there may be insurance to cover the contractual obligation undertaken by Danos & Curole Marine Contractors, Inc. This Court does not normally decide issues not presented below though it is not precluded from doing so. *Carlson v. Green,* 446 U.S. 14 (1980) at 15 n. 2. There is no reason to consider that issue in this case and respondent urges the Court not to do so. The Louisiana Oilfield Indemnity Act specifically deals with the question of insurance stating,

> Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect. La. R.S. 9:2780 (G)

The Louisiana statute very clearly invalidates any requirement in any contract requiring insurance that would effectively accomplish what the indemnity provision of the contract is prohibited from doing. That invalidates the insurance provision as well.

## THE LOUISIANA OILFIELD INDEMNITY ACT DOES NOT VIOLATE THE CONTRACT CLAUSE, THE DUE PROCESS CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

### CONTRACT CLAUSE

The first step in analyzing a challenge to a state statute based on the contract clause is an inquiry as to whether there has been a substantial impairment of a contractual

relatic .ship. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). There is no substantial impairment in this case. The contract is what is commonly known in the industry as a "blanket service contract." It is intended to cover all work performed by one party for the other during the continued existence of the contract. For each new job that was to be performed Gulf had to contact Danos & Curole Marine Contractors, Inc. and request that Danos & Curole Marine Contractors, Inc. undertake the job, and Danos & Curole Marine Contractors, Inc. was free to decline, without penalty. If the job were accepted it would be subject to the blanket service contract. The job which was being performed at the time of the incident at issue was one for which the initial call was made after enactment of the Louisiana Oilfield Indemnity Act.

The contract, by its terms, provides that it may be cancelled by either party simply by giving ten (10) days written notice to the other party. The blanket service contract was executed by the parties prior to enactment of the Louisiana Oilfield Indemnity Act, but, as indicated above, the job in question arose after the enactment. Both parties left the contract in effect subsequent to enactment of that statute subject, still, to the provision that either party could cancel simply by giving notice to the other. Petitioner surely cannot claim any "vested" rights that have been substantially impaired. No rights have been impaired at all.

Even if there has been an impairment of contractual rights, the statute passes constitutional muster if it is a rational attempt by the state legislature to advance a legitimate state interest. *Exxon Corp. v. Eagerton,* 462 U.S.

176 (1983). As the Fifth Circuit Court of Appeals said in *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123 (5th Cir. 1986), another case construing the same legislation,

> If not the most important industry, the oil, gas and mineral industry is one of the most important industries in the State of Louisiana. Its tremendous impact on the vitality and well-being of the state's economic life cannot be gainsaid . . .
>
> One who remains liable and exposed for his own negligence is more likely to act with care. This act is a rational attempt to improve oilfield safety. It is not unconstitutional. 781 F.2d at 1130.

The statute is a rational attempt to advance safety in the workplace among other state interests.

## DUE PROCESS CLAUSE

The challenged statute adjusts only the economic relationship between the parties to the contract. The act thus enjoys a presumption of constitutionality and the burden is on the party challenging it to show that the legislature has acted in an arbitrary or irrational way. *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976). For the reasons discussed in the next preceding section regarding the Contract Clause it is clear that the Louisiana legislature had a rational purpose for the enactment of the statute and it advanced that purpose in a reasonable way.

## EQUAL PROTECTION CLAUSE

The Louisiana Oilfield Indemnity Act does not adversely affect a fundamental interest nor does it contain

a classification based on a suspect criterion. Accordingly, it is not subject to challenge on equal protection grounds as long as the legislature enacting it,

> . . . could have reasonably concluded that the challenged classification would promote a legitimate state purpose. *Exxon Corp. v. Eagerton,* 462 U.S. at 196. (citation omitted)

The statute applies equally to parties involved in the mineral industry in the State of Louisiana. For the reasons discussed by the Fifth Circuit Court of Appeals in *Knapp v. Chevron U.S.A.,* 781 F.2d 1123 (5th Cir. 1986) set out in the section above pertaining to the Contract Clause, the classification would and does promote a legitimate state purpose and the legislature could have reasonably so concluded.

———o———

## CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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